Supreme Court, U. S.
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No. 79-415

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW KIRKPATRICK MEARNS, III, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WADE H. McCREE, JR.
Solicitor General

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UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW KIRKPATRICK MEARNS, III, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 599 F.2d 1296. The opinion of the district court (App. B, *infra*, 7a-12a) is reported at 461 F. Supp. 641.

JURISDICTION

The judgment of the court of appeals (App. F, *infra*, 16a-17a) was entered on June 15, 1979. A petition for rehearing with a suggestion for rehearing

en banc was denied on August 13, 1979 (App. G, *infra*, 18a-19a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a special parole term may be imposed as part of the sentence for conspiracy to distribute controlled substances under 21 U.S.C. 846.

STATUTES INVOLVED

21 U.S.C. 841(b)(1)(B) provides in pertinent part:

> In the case of a controlled substance in Schedule I or II which is not a narcotic drug or in the case of any controlled substance in Schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000 or both. * * * Any sentence imposing a term of imprisonment, under this paragraph, shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

1. Upon their pleas of guilty, respondents Mearns, Thomas, and Hedley were convicted in the United States District Court for the District of Delaware on one count of conspiracy to distribute cocaine and to possess the drug with intent to distribute it, in violation of 21 U.S.C. 846.[1] Respondents were each sentenced to six months' imprisonment to be followed by a three-year special parole term.

2. Following service of his prison term, respondent Mearns filed a motion to correct his sentence pursuant to Fed. R. Crim. P. 35, claiming that imposition of the special parole term was not authorized by Section 846. The district court granted the motion and deleted the special parole term from Mearns' sentence (App. C, *infra*, 13a). Thereafter, respondents Thomas and Hedley moved for, and were granted, the same relief (Apps. D and E, *infra*, 14a-15a).

3. The government appealed, and the court of appeals affirmed. In so doing, the court noted that in fixing the penalty for conspiring to violate the narcotics laws, Section 846 does not mention special parole but refers only to punishment by fine, imprisonment or both, whereas the penalties which the Comprehensive Drug Abuse Prevention and Control

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[1] Additionally, respondents were charged with two counts of distribution of cocaine, and one count of possession with intent to distribute cocaine, all in violation of 21 U.S.C. 841(a)(1). Following acceptance of respondents' pleas of guilty, these counts were dismissed.

Act of 1970 authorize for substantive drug offenses include not only imprisonment and fines, but special parole as well. See 21 U.S.C. 841(b)(1)(A). Therefore, the court concluded, Congress must have intended that special parole could not be made part of the sentence for conspiracy under Section 846, even if the conspiracy had as its object the commission of a substantive offense for which a special parole term could be imposed (App. A, *infra*, 4a-6a). Accordingly, the court held that special parole could not be imposed as part of respondents' punishment for the drug distribution conspiracy.

REASONS FOR GRANTING THE PETITION

The question presented by this case is identical to that presented in *Bifulco* v. *United States*, No. 79-5010, petition for certiorari filed July 3, 1979, in which the government has recommended that the Court grant certiorari.[2] Here, as in *Bifulco*, the defendant was sentenced initially to a special parole term following a drug conspiracy conviction. However, in *Bifulco* the court of appeals held that a special parole term must be imposed for a drug conspiracy offense under Section 846 whenever such a term is required for the offense that is the object of the conspiracy. *Bifulco* v. *United States*, 600 F.2d

[2] In *Bifulco*, petitioner was convicted on one count of conspiracy to manufacture, distribute, and possess with intent to distribute phencyclidine, a Schedule III controlled substance. A copy of the government's response in *Bifulco* has been transmitted to the respondents.

407, 409-410 (2d Cir. 1979).[3] Thus, the two cases are in direct conflict.

We believe that the court of appeals was correct in holding in *Bifulco* that the Comprehensive Drug Abuse Prevention and Control Act of 1970 contemplates imposition of a special parole term upon conviction for a drug conspiracy offense whenever such a term is authorized for the substantive offense and that the contrary holding of the court of appeals in this case is erroneous. In any event, we submit that the conflict among the circuits on this issue should be resolved by this Court. Accordingly, we believe that the disposition of this petition should be deferred pending the disposition of *Bifulco*.

[3] Accord, *United States* v. *Sellers*, No. 79-1107 (8th Cir. Aug. 7, 1979) slip op. 11-14; *Cantu* v. *United States*, 598 F.2d 471, 472 (5th Cir. 1979); *United States* v. *Burman*, 584 F.2d 1354, 1357-1358 (4th Cir. 1978); *United States* v. *Jacobson*, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978). See also *United States* v. *Dankert*, 507 F.2d 190, 191 (5th Cir. 1975).

CONCLUSION

The Court should dispose of this petition in accordance with its disposition of *Bifulco* v. *United States*, No. 79-5010.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DEPUE
Attorney

SEPTEMBER 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 79-1044
79-1045
79-1046

UNITED STATES OF AMERICA, APPELLANT

v.

ANDREW KIRKPATRICK MEARNS, III,
PETER JOHN THOMAS,
JOHN WILLIAM HEDLEY,
APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

(D.C. Crim. Nos. 77-090-01)
Submitted Under Third Circuit Rule 12(6)

May 3, 1979

Before ADAMS, GIBBONS and WEIS, *Circuit Judges*

Opinion filed June 15, 1979

OPINION OF THE COURT

WEIS, *Circuit Judge.*

The Comprehensive Drug Abuse Prevention and Control Act of 1970 provides for the imposition of a special parole period in addition to imprisonment for substantive violations of the Act. The conspiracy section, however, lists only fine and imprisonment as punishment, and the district court concluded that it was not permitted to impose a special parole term for that violation. We agree and affirm.

Defendants were indicted on two counts of distribution and one count of possession of cocaine with intent to distribute, violations of 21 U.S.C. § 841(a). In addition, they were charged with conspiracy to possess and distribute cocaine, proscribed by 21 U.S.C. § 846. As the result of an agreement with the government, defendants pleaded guilty to the conspiracy count, and the other charges were dismissed. Each then received a sentence of six months incarceration, followed by a special parole term of three years. After defendant Mearns completed his prison term, he moved to correct his sentence under Fed. R. Crim. P. 35, alleging that the statute did not sanction the imposition of the special parole term on a conspiracy conviction. The district court concurred and deleted the parole requirement. *United States* v. *Mearns*, 461 F.Supp. 641 (D. Del. 1978). A few days later, defendants Thomas and Hedley moved for, and were granted, the same relief. The government then took this appeal.

Sections 841 and 846 are part of the Comprehensive Drug Abuse Prevention and Control Act of 1970,

Pub. L. No. 91-513, 84 Stat. 1236, which revamped the federal drug laws. An aim of this statutory revision was to provide "an overall balanced scheme of criminal penalties for offenses involving drugs." H.R. REP. No. 1444, 91st Cong., 2d Sess. 1, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4567. Thus, the language chosen by Congress for each penalty provision reflects a fully considered judgment and should be read carefully.

Turning then to the statutory language, 21 U.S.C. § 846 in pertinent part provides:

> "Any person who . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the . . . conspiracy."

The punishment provided for the offenses of distributing and possession with intent to distribute cocaine is found in 21 U.S.C. § 841(b)(1)(A) and consists of imprisonment for not more than 15 years, a maximum fine of $25,000, or both. In addition, this subsection continues:

> "Any sentence imposing a term of imprisonment under this paragraph shall . . . impose a special parole term of at least 3 years in addition to such term of imprisonment . . . ."

We note first that § 846 does not mention parole, but refers only to punishment by fine, imprisonment, or both. The maximum limitations are determined

by reference to the earlier sections pertaining to the substantive offenses. The substantive section applicable here, § 841, prescribes not only imprisonment, fine or both but when imprisonment is imposed, it mandates an additional special parole term. Thus, while the conspiracy section provides for two forms of punishment, fine and imprisonment, the substantive section provides for three: fine, imprisonment, and special parole.

The government argues that "parole" is included within the meaning of "imprisonment," but this contention is not persuasive. Parole is a term of supervision served outside a penal institution and is distinct from imprisonment. Moreover, the penalty provisions of the substantive offense sections state that the special parole is to be imposed "in addition to" such term of imprisonment. The statutory language simply cannot be reconciled with the government's position. For this reason we decline to follow the holding in *United States* v. *Jacobson*, 578 F.2d 863 (10th Cir.), *cert. denied*, —— U.S. ——, 47 U.S.L.W. 3302 (U.S. Oct. 30, 1978), which adopted the government's argument. Nor can we accept the position taken by the Court of Appeals for the Fourth Circuit in *United States* v. *Burman*, 584 F.2d 1354 (4th Cir. 1978), that because sentences under § 846 are determined by reference to the substantive offense provisions, a special parole term is permissible. That rationale fails to recognize that by its express terms § 846 includes only fine and imprisonment. Similarly,

United States v. *Dankert*, 507 F.2d 190 (5th Cir. 1975) (per curiam), must also be rejected.[1]

We are persuaded by the analysis of the district courts in *Fassette* v. *United States*, 444 F. Supp. 1245 (C.D. Cal. 1978), and *United States* v. *Jacquinto*, 464 F.Supp. 728 (E.D. Pa. 1979), as well as Judge Stapleton's well-reasoned opinion in this case, holding that special parole does not apply to § 846. If Congress had intended to provide a special parole term for a violation of that section, it could easily have done so. Indeed, the legislative history discusses a parole provision for various substantive offenses but significantly omits that term in describing the punishment applicable to § 846. *See* H.R. REP. No. 1444, 91st Cong., 2d Sess. 46-51, *reprinted in* [1970] U.S. CONG. & AD. NEWS 4614-18.

In the criminal context, it has long been the policy of the courts that a defendant should not "be subjected to a penalty unless the words of the statute

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[1] In United States v. Timmreck, —— U.S. ——, 47 U.S.L.W. 4577 (U.S. May 21, 1979), *rev'g*, 577 F.2d 372 (6th Cir. 1978), the Supreme Court articulated the standards to be applied in 28 U.S.C. § 2255 cases where a violation of Fed. R. Crim. P. 11 is alleged. In that case, the purported Rule 11 violation was the trial court's failure to advise the defendant of the special parole term accompanying his imprisonment for pleading guilty to a § 846 conspiracy count. Neither the Supreme Court nor the court of appeals, however, considered whether special parole was required in sentences for conspiracy convictions. Indeed, the Supreme Court limited its grant of certiorari to the Rule 11 issue. —— U.S. ——, 47 U.S.L.W. 3426 (U.S. Dec. 19, 1978). Consequently, we do not consider that case as authority for the proper interpretation of § 846.

plainly impose it." *United States* v. *Campos-Serrano*, 404 U.S. 293, 297 (1971), *quoting Keppel* v. *Tiffin Savings Bank*, 197 U.S. 356, 362 (1905). *See also United States* v. *Gomez*, 593 F.2d 210, 214 (3d Cir. 1979) (en banc). The words of § 846 plainly do not impose a special parole term, however desirable such a penalty may seem. If such a change would be salutary, it is for Congress, not this court, to effect it.

Accordingly, we conclude that the district court properly determined that special parole could not be imposed for a conviction under § 846 and, therefore, we affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 77-90

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW K. MEARNS, III, DEFENDANT

OPINION

Wilmington, Delaware

December 8, 1978

STAPLETON, District Judge:

On October 6, 1977, the defendant was indicted on four counts. Counts I and II charged distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). Count III charged possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Count IV charged a conspiracy to possess and distribute cocaine in violation of 21 U.S.C. § 846. On February 1, 1978, after the disposition of pretrial defense motions,* the government and the defendant entered into a plea agreement. Pursuant to that agreement, Mearns pled guilty to Count IV, the conspiracy count. The government agreed to dismiss Counts I, II and

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* *United States* v. *Mearns*, 443 F. Supp. 1244 (D. Del. 1978).

III. After accepting the plea agreement, the Court gave the defendant the choice of being sentenced to an indeterminate term under the Youth Corrections Act, 18 U.S.C. § 5005, *et seq.*, or being sentenced as an adult for a period of six months, to be followed by a special parole term of three years, pursuant to 21 U.S.C. § 846. The defendant chose the adult sentence.

The defendant has completed service of the six months of imprisonment. He now claims, however, that the imposition of the special parole term for a conspiracy conviction is illegal and has moved to correct his sentence, pursuant to Rule 35 of the Federal Rules of Criminal Procedure.* The government opposes the motion and contends that the sentence is not illegal. In order to understand the contentions of the parties, it is necessary to examine the relevant statutory provisions.

Under 21 U.S.C. § 841(a)(1), the manufacture, distribution, or possession with intent to distribute, of specified controlled substances, is a criminal offense. Section 841(b), which provides for sentencing for convictions under Section 841(a), states, in pertinent part:

> . . . any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of

* Rule 35 provides that "[t]he court may correct an illegal sentence at any time. . .".

> not more than $25,000, or both. . . . Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment. . . .

Thus, if a person convicted of violating Section 841(a) receives a sentence including any imprisonment, a mandatory special parole term is also imposed. Section 841(c) provides:

> A special parole term imposed under this section . . . may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. . . .

21 U.S.C. § 846, the statute under which the defendant was convicted, provides:

> Any person who . . . conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the . . . conspiracy.

The issue presented by this motion is whether Section 846 allows the imposition of a special parole term for a conspiracy conviction.

Section 846, on its face, provides for a sentence only of "imprisonment or fine or both . . .". The government's main argument in opposition to the defendant's motion is that the special parole term is included within the meaning of "imprisonment" as that word is used in Section 846. The recent decision of the Tenth Circuit in *United States* v. *Jacobson*, 578 F.2d 863 (10th Cir. 1978), supports this view. *See also United States* v. *Dankert*, 507 F.2d 191 (5th Cir. 1975). The *Jacobson* court stated at 578 F.2d at 868:

> From the wording in § 841(b)-(c), it would appear that Congress viewed the special parole term as being a part of the term of imprisonment to which it was applied. Paragraphs (1) to (3) of § 841(b) all make a special parole term mandatory whenever imprisonment is also imposed. Thus, a parole term may never be imposed without imprisonment; it must always accompany imprisonment. Section 841(c) provides, in addition, that violation of the special parole may result in an increase in the original term of imprisonment to the extent of the length of the special parole term. It is impossible, therefore, to accept the argument that the parole term is to be imposed only where the charge is violation of the substantive provision. It is logical to view the reference to imprisonment in § 846 as intending to incorporate all of the imprisonment provision in § 841(b).

However, I respectfully disagree with the construction of Section 846 reached by the *Jacobson* court and urged by the government. That construction ignores an important part of the language

of Section 841(b)(1)(A). That section provides that where a special parole term is mandated by a sentence of imprisonment, it is to be imposed "in addition to such term of imprisonment." Thus, as used in Section 841, special parole is not merely part of imprisonment, but is considered to be something additional to the imprisonment. I do not believe that the use of the word "imprisonment" in Section 846 was meant to be any broader in scope than its use in Section 841(b)(1)(A). Thus, my reading of Section 846 leads me to the conclusion that the only sentences permitted for its violation are imprisonment or fine, or both, and that a term of special parole may not be imposed. As the court said in *Fassette* v. *United States*, 444 F. Supp. 1245, 1247 (C.D. Cal. 1978):

> If Congress had intended and had desired to have the permissible punishment for the conspiracy offense of § 846 identical with that permitted for the substantive offense of § 841, it could easily and clearly have said so. Instead, Congress used language in § 846 which separately defines the permissible punishment for violations of that section and uses different language in defining it.

I agree with the conclusion of the *Fassette* court, especially since Section 846 is a criminal statute which must be given a strict construction.

Finally, the government argues that since the defendant was given a choice of two sentences, and chose the adult sentence which included a term of special parole, he cannot now complain about that sentence.

However, merely because the defendant was given a choice of sentences and chose one which erroneously stated the applicable law does not mean that he must suffer the consequences of the Court's misstatement by serving an illegal sentence.

An Order will be entered correcting the defendant's illegal sentence by deleting the requirement that he have a special parole term of three years.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 77-90

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW K. MEARNS, III, DEFENDANT

ORDER

THIS 8th day of December, 1978, for the reasons stated in the Court's Opinion of this date,

Now, therefore, IT IS ORDERED that the Court's Judgment and Commitment Order of March 8, 1978 is modified by the deletion of any reference to a special parole term.

/s/ Walter K. Stapleton
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 77-90

UNITED STATES OF AMERICA, PLAINTIFF

v.

PETER JOHN THOMAS, DEFENDANT

ORDER

THIS 13th day of December, 1978, defendant Peter John Thomas having moved for correction of an illegal sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for the reasons stated in the Court's Opinion in *United States* v. *Mearns*, —— F. Supp. —— (Cr. A. 77-90, December 8, 1978),

Now, therefore, IT IS ORDERED that the Court's Judgment and Commitment Order of March 8, 1978 is modified by the deletion of any reference to a special parole term.

/s/ Walter K. Stapleton
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Criminal Action No. 77-90

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANDREW K. MEARNS, III,
PETER JOHN THOMAS and
JOHN WILLIAM HEDLEY,
DEFENDANTS

ORDER

IT IS HEREBY ORDERED this 22 day of December 1978, that the sentence of a special parole term imposed on John William Hedley in this case be removed and vacated.

/s/ Walter K. Stapleton
J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1044/79-1046

UNITED STATES OF AMERICA, APPELLANT

vs.

MEARNS, ANDREW KIRKPATRICK, III,
APPELLEE in No. 79-1044
THOMAS, PETER JOHN,
APPELLEE in No. 79-1045
HEDLEY, JOHN WILLIAM,
APPELLEE in No. 79-1046

(D. C. Criminal No. 77-00090-01-02 and 03)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Present: ADAMS, GIBBONS and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was submitted under Third Circuit Rule 12(6) on May 3, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, dated December 8, 1978 in our No. 79-1044; dated December 13, 1978 in our

No. 79-1045 and dated December 22, 1978 in our No. 79-1046, be, and the same are hereby affirmed.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

June 15, 1979

Certified as a true copy and issued in lieu of a formal mandate on August 21, 1979.

Test:

THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1044/45/46

UNITED STATES OF AMERICA, APPELLANT

v.

ANDREW KIRKPATRICK MEARNS, III,
PETER JOHN THOMAS,
JOHN WILLIAM HEDLEY,
APPELLEES

SUR PETITION FOR REHEARING

Present: ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Honorable Collins J. Seitz, *Chief Judge* did not participate in the consideration of this matter.

Honorable Leonard I. Garth and Honorable A. Leon Higginbotham, Jr. would grant the petition for rehearing.

By the Court,

/s/ Weis
Judge

Dated: August 13, 1979

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